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7 JORGE ANDRADE RICO,
8 Plaintiff,
9 v.
10 SECRETARY OF CDCR, et al.,
11 Defendants.

Case No. 23-cv-02122-PCP

**ORDER OF DISMISSAL IN PART AND
SERVICE IN PART**

Re: Dkt. No. 16

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13 Jorge Rico, an inmate at Pelican Bay State Prison, filed this *pro se* civil rights action under
14 42 U.S.C. § 1983. The Court dismissed Mr. Rico’s original complaint with leave to amend. *See*
15 Dkt. No. 13. Mr. Rico thereafter filed an amended complaint. Upon review of the amended
16 complaint under 28 U.S.C. § 1915A, the Court concludes that Mr. Rico has stated a cognizable
17 claim for retaliation against defendants Gonzales and Vaugh and orders service of the amended
18 complaint on those defendants. All other claims and defendants are dismissed without leave to
19 amend.

20 **I. Background**

21 As defendants, Mr. Rico names the Secretary of the California Department of Corrections
22 and Rehabilitation (“CDCR Secretary”) in his official capacity; the warden of Pelican Bay State
23 Prison (“PBSP Warden”) in his official capacity; mailroom officer Gonzales in her individual
24 capacity; and mailroom officer Vaugh in her individual capacity. *See* Am. Compl. at 2–3.

25 At all relevant times, Mr. Rico was incarcerated at PBSP. Beginning in 2016, Mr. Rico
26 filed civil rights lawsuits against PBSP employees. *See id.* at 3.

27 In October and November of 2020, Mr. Rico’s incoming and outgoing legal mail was
28 delayed for a week.

1 On December 10, 2020, a reply brief was filed by defendants in Mr. Rico's Northern
2 District action. Mr. Rico contends that this reply brief was mailed to him and was lost by the
3 mailroom on or around December 14, 2020. Mr. Rico contends that because he did not receive this
4 reply brief, he was prevented from responding to the reply brief. *See id.* Mr. Rico does not state
5 what response he would have made to the reply brief, *see id.*, and the Northern District does not
6 permit litigants to respond to reply briefs, *see* Civ. L.R. 7-3(d) (allowing sur-replies only to object
7 to new evidence introduced in the reply brief, or to bring new legal authority to the court's
8 attention).

9 Mr. Rico filed administrative grievances regarding these mailroom issues. *See* Am. Compl.
10 at 3. Two mailroom officers, defendants Gonzales and Vaugh, interviewed Mr. Rico about his
11 grievances. Mr. Rico contends that these defendants refused to properly investigate his mail-
12 related grievances and asked him not to file grievances against them. *See id.* at 4–5.

13 After this interview, on May 7, 2021, mail arrived at PBSP from Mr. Rico's attorney. *See*
14 *id.* at 5. Mr. Rico contends that this mail informed him of an appealable ruling in a case he had
15 pending before the Ninth Circuit. The mail was lost somewhere in the mailroom, and Mr. Rico did
16 not learn of the Ninth Circuit ruling until mid-August 2021. *See id.* at 6 (stating that he learned of
17 the Ninth Circuit ruling sometime between August 16 and 18, 2021). Mr. Rico contends that
18 because of this delay, he lost the ability to appeal the Ninth Circuit ruling to the U.S. Supreme
19 Court. *See id.* at 6–7. A review of the Ninth Circuit docket reveals that two orders were issued
20 around the time Mr. Rico complains of: an order denying a petition for rehearing en banc on April
21 28, 2021, and a mandate issued on May 6, 2021. *See* Dkt. Nos. 54, 55, *Rico v. Ducart*, Appeal No.
22 19-15541 (9th Cir. Apr. 28 and May 6, 2021, respectively).

23 From March 16, 2020 to July 19, 2021, the deadline for filing a petition of writ of
24 certiorari in the U.S. Supreme Court was extended from 90 days to 150 days. This extension
25 applied to any appealable ruling issued within that period. *See* U.S. Supreme Court, Rules and
26 Guidance: Guidance Concerning Clerk's Office Operations, https://www.supremecourt.gov/announcements/COVID-19_Guidance_July_2021.pdf (last visited April 4, 2025). Mr. Rico
27 therefore had until September 26 or October 4, 2021, to appeal the relevant orders.

II. Legal Standard

Federal courts must screen any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See 28 U.S.C. § 1915A(a)*. The court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

III. Analysis**A. Defendants Gonzales and Vaugh**

Mr. Rico has stated a cognizable retaliation claim against defendants Gonzales and Vaugh, but his mail delay and access-to-the-courts claims fail.

1. Mail delay claim

Prisoners enjoy a First Amendment right to send and receive mail. *See Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). Prison officials have a responsibility to forward mail to inmates promptly. *See Bryan v. Werner*, 516 F.2d 233, 238 (3d Cir. 1975). A temporary delay or isolated incident of delay, however, does not violate a prisoner's First Amendment rights. *See Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999) (policy of diverting publications through property room reasonably related to prison's interest in inspecting mail for contraband).

Mr. Rico complains that he experienced mail delays in October and November of 2020, each of which lasted less than a week. *See* Am. Compl. at 3. Such brief, temporary delays do not state a First Amendment claim. *See Crofton*, 170 F.3d at 961.

2. Retaliation claim

Retaliation is actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v.*

1 Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005) (footnote omitted). The prisoner must show that
2 the type of activity he was engaged in was constitutionally protected, that the protected conduct
3 was a substantial or motivating factor for the alleged retaliatory action, and that the retaliatory
4 action advanced no legitimate penological interest. *Hines v. Gomez*, 108 F.3d 265, 267–68 (9th
5 Cir. 1997) (inferring retaliatory motive from circumstantial evidence).

6 Mr. Rico alleges that after he filed grievances, Defendants Gonzales and Vaugh told him
7 not to file grievances or lawsuits against them, and in 2021 several items of his legal mail
8 vanished. *See* Am. Compl. at 4–5. Mr. Rico also alleges that Defendants Gonzales and Vaugh
9 work in the PBSP mail room, which gives them access to his legal mail. *See id.* at 2–3. Mr. Rico
10 identified a constitutionally protected activity (writing grievances), an adverse action
11 (disappearing mail), and connected it to the protected activity. This is sufficient to survive
12 screening, and defendants Gonzales and Vaugh must respond to this claim.

13 3. Access-to-the-courts claim

14 The deliberate delay of legal mail which adversely affects legal proceedings presents a
15 cognizable claim for denial of access to the courts. *See Jackson v. Procunier*, 789 F.2d 307, 311
16 (5th Cir. 1986). To claim violation of the right of access to the courts, the prisoner must prove that
17 there was an inadequacy in the prison’s legal access program that caused him an actual injury.
18 *Lewis v. Casey*, 518 U.S. 343, 349–51 (1996). To prove an actual injury, the prisoner must show
19 that the inadequacy in the prison’s program hindered his efforts to pursue a non-frivolous claim
20 concerning his conviction or conditions of confinement. *See id.* at 351, 354–55. Here, information
21 provided in the amended complaint, and available through public records, reveals that Mr. Rico
22 was not so hindered.

23 First, Mr. Rico represents that he never received a reply filed by the defendants in a
24 Northern District of California lawsuit, although this reply was mailed to the prison. *See* Am.
25 Compl. at 4. The previous Northern District action appears to have concerned a due process claim.
26 *See* Dkt. No. 20, *Rico v. Bristow*, Case No. 19-cv-05892-CRB (N.D. Cal. March 9, 2021)
27 (granting defendants’ summary judgment motion and summarizing case). Mr. Rico claims that,
28 because he did not receive defendants’ reply, this deprived him of the chance to “fil[e] a[.]

1 response” to that reply. Am. Compl. at 9.

2 Under the Northern District’s Civil Local Rules, a party may only respond to a reply if the
3 reply introduced new evidence, or if the party needs to bring new legal authority to the court’s
4 attention. *See* Civ. L.R. 7-3(d). The reply discussed by Mr. Rico does not introduce any new
5 evidence. *See* Dkt. No. 19, *Rico v. Bristow*, Case No. 19-cv-05892-CRB (N.D. Cal. filed Dec. 10,
6 2020). The order granting summary judgment in the previous Northern District action does not
7 rely on the reply at all. *See* Dkt. No. 20, *Rico v. Bristow*, Case No. 19-cv-05892-CRB (N.D. Cal.
8 filed March 9, 2021). Finally, Mr. Rico does not identify, and the Court was unable to find, any
9 legal authority helpful to Mr. Rico’s due process claim that was issued in the three-month period
10 between the filing of the reply and the granting of summary judgment. Judicially noticeable facts
11 thus show that Mr. Rico suffered no actual injury as a result of not receiving the reply.

12 Second, Mr. Rico represents that he did not receive a May 7, 2021 letter from his counsel
13 in a Ninth Circuit Court of Appeals lawsuit, which would have informed him of an appealable
14 Ninth Circuit ruling. *See* Am. Compl. at 5, 7. Mr. Rico does not specify which ruling avoided his
15 notice, but court records show that the Ninth Circuit denied Mr. Rico’s petition for rehearing en
16 banc on April 28, 2021, and issued its mandate on May 6, 2021. *See* Dkt. Nos. 54–55, *Rico v.*
17 *Ducart*, Appeal No. 19-15541 (9th Cir.). Mr. Rico contends that defendants’ failure to deliver his
18 attorney’s letter “hinder[ed] obstruct[ed] and den[ied] [him his] right to appeal that decision.” *Id.*
19 at 7. Mr. Rico received information regarding the ruling in a second letter, which he received no
20 later than August 18, 2021. *See id.* at 6.

21 The loss of his attorney’s letter did not deprive Mr. Rico of his chance to appeal the Ninth
22 Circuit’s ruling to the United States Supreme Court. From March 16, 2020 to July 19, 2021, the
23 deadline for filing a petition of writ of certiorari in the United States Supreme Court was extended
24 from 90 days to 150 days. *See* U.S. Supreme Court, Rules and Guidance: Guidance Concerning
25 Clerk’s Office Operations, https://www.supremecourt.gov/announcements/COVID-19_Guidance_July_2021.pdf (last visited April 4, 2025). This extension applied to any appealable
26 ruling issued within that period, so it applied to both the denial of Mr. Rico’s petition for rehearing
27 en banc and to the mandate. Whichever ruling Mr. Rico wished to challenge, he had until
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1 September 26 or October 4, 2021, respectively, to appeal it. The amended complaint clearly states
2 that Mr. Rico learned of the ruling at issue no later than August 18, 2021, which left him more
3 than five weeks to file an appeal. *See* Am. Compl. at 6. Because Mr. Rico still could have
4 appealed to the U.S. Supreme Court, he suffered no actual injury from the loss of his attorney's
5 letter.¹

6 Because the facts show that Mr. Rico did not suffer an actual injury from the mailroom's
7 failure to transmit any mail, his access-to-the-courts claim fails.

8 **B. CDCR Secretary and PBSP Warden**

9 The Court previously explained to Mr. Rico that he can only sue defendants who were
10 personally involved in the wrongs perpetrated against him. *See* Dkt. No. 13 at 5–6; *see also*
11 *Lemire v. Cal. Dept. of Corrections & Rehabilitation*, 726 F.3d 1062, 1085 (9th Cir. 2013)
12 (explaining that liability may only be imposed on an individual defendant under 42 U.S.C. § 1983
13 if the plaintiff can show that the defendant's actions both actually and proximately caused the
14 constitutional deprivation).

15 The amended complaint makes clear that Mr. Rico sues the CDCR Secretary and the PBSP
16 Warden based on their supervisory duties, not because they were personally involved in injuring
17 him. *See* Am. Compl. at 2. “In a § 1983 or a *Bivens* action … each Government official, his or her
18 title notwithstanding, is only liable for his or her own misconduct.” *Ashcroft v. Iqbal*, 556 U.S.
19 662, 677 (2009). Under no circumstances is there liability under section 1983 solely because one
20 is responsible for the actions or omissions of another. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th
21 Cir. 1989); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680–81 (9th Cir.
22 1984).

23 Because the amended complaint sues the CDCR Secretary and PBSP Warden merely
24 because they are supervisors, and alleges zero personal involvement by either individual, these
25 defendants must be dismissed.

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¹ If Mr. Rico's attorney was not aware of the U.S. Supreme Court's extended deadline, that is a matter to raise with the attorney rather than the PBSP mail room.

1 **IV. Conclusion**

2 1. Liberally construed, the amended complaint states a First Amendment retaliation
3 claim against defendants Gonzales and Vaugh. All other claims and defendants are DISMISSED.

4 2. The Court orders service of the amended complaint on defendants Gonzales and
5 Vaugh and orders them to respond to Mr. Rico's First Amendment retaliation claim. Service on
6 Gonzales and Vaugh shall proceed under the California Department of Corrections and
7 Rehabilitation's ("CDCR") E-Service Program for civil rights cases from prisoners in CDCR
8 custody. In accordance with the program, the Clerk is directed to serve on CDCR via email the
9 following documents: The amended complaint and exhibits thereto (Dkt. No. 16), this order of
10 service, a CDCR Report of E-Service Waiver form, and a summons. The Clerk also shall serve a
11 copy of this order on Mr. Rico.

12 3. No later than **forty (40) days** after service of this order via email on CDCR, CDCR
13 shall provide the Court a Completed CDCR Report of E-Service Waiver advising the Court
14 whether all defendants will be waiving service of process without the need for service by the
15 United States Marshal Service ("USMS"), or whether any defendant declined to waive service or
16 could not be reached.

17 4. CDCR shall provide a copy of the CDCR Report of E-Service Waiver to the
18 California Attorney General's Office which, within **twenty-one (21) days**, shall file with the
19 Court a waiver of service of process for each defendant who is waiving service.

20 5. If any defendant does not waive service, then upon receipt of the CDCR Report of
21 E-Service Waiver, the Clerk shall prepare a USM-285 Form. The Clerk shall provide to the USMS
22 the completed USM-285 forms and copies of this order, the summons, and the operative complaint
23 for service upon the non-waiving defendant. The Clerk also shall provide to the USMS a copy of
24 the CDCR Report of E-Service Waiver.

25 6. No later than **ninety (90) days** from the filing date of this order, defendants shall
26 file **one comprehensive motion for summary judgment or other dispositive motion** with
27 respect to the Amended Complaint. Any motion for summary judgment shall be supported by
28 adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules

1 of Civil Procedure. A motion for summary judgment also must be accompanied by a separate
2 *Rand* notice so that Mr. Rico will have fair, timely and adequate notice of what is required of him
3 in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012) (notice
4 requirement set out in *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), must be served
5 concurrently with motion for summary judgment). Defendants are advised that summary judgment
6 cannot be granted, nor qualified immunity found, if material facts are in dispute.

7 7. If any defendant is of the opinion that this case cannot be resolved by summary
8 judgment, he or she shall so inform the Court prior to the date the summary judgment motion is
9 due. Information regarding the Court's Alternative Dispute Resolution Program is available on the
10 website for the United States District Court for the Northern District of California.

11 8. Mr. Rico's opposition to the dispositive motion shall be filed with the Court and
12 served on defendants no later than **twenty-eight (28) days** from the date defendants' motion is
13 filed. Mr. Rico is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex*
14 *Corp. v. Catrett*, 477 U.S. 317 (1986) (party opposing summary judgment must come forward
15 with evidence showing triable issues of material fact on every essential element of his claim).

16 9. Defendants **shall** file a reply brief no later than **fourteen (14) days** after Mr. Rico's
17 opposition is filed.

18 10. All communications by Mr. Rico with the Court must be served on defendants or
19 defendants' counsel once counsel has been designated, by mailing a true copy of the document to
20 defendants or defendants' counsel.

21 11. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
22 **No further court order under Federal Rule of Civil Procedure 30(a)(2) is required before the**
23 **parties may conduct discovery.** Mr. Rico is advised to read Federal Rule of Civil Procedure 37,
24 which requires each party to "in good faith confer[] or attempt[] to confer with" the opposing party
25 regarding a discovery dispute, before seeking court action to resolve such a dispute.

26 12. It is Mr. Rico's responsibility to prosecute this case. Mr. Rico must keep the Court
27 informed of any change of address by filing a separate paper with the Clerk headed "Notice of
28 Change of Address." He also must comply with the Court's orders in a timely fashion. Failure to

1 do so will result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of
2 Civil Procedure 41(b).

3 The Clerk shall update the caption to reflect that only defendants Gonzales and Vaugh
4 remain in this action.

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6 **IT IS SO ORDERED.**

7 Dated: April 15, 2025

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P. Casey Pitts
United States District Judge